

The Honorable

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

ERMI LLC,

Plaintiff,

v.

INTERNATIONAL REHABILITATIVE
SCIENCES, INC., d/b/a RS MEDICAL

Defendant.

Case No.

**COMPLAINT FOR PATENT
INFRINGEMENT**

DEMAND FOR JURY TRIAL

Plaintiff ERMI LLC (hereinafter “ERMI” or “Plaintiff”), in support of this Complaint against Defendant International Rehabilitative Sciences, Inc. d/b/a RS Medical (hereinafter “RS Medical” or “Defendant”), does hereby allege as follows:

NATURE OF THE ACTION

1. ERMI brings this action for willful patent infringement pursuant to the Patent Act, 35 U.S.C. § 101, *et seq.*, and includes claims for damages and injunctive relief under §§ 154, 281, 283-285 of that Title.

THE PARTIES

2. ERMI is a Delaware limited liability company with its principal offices located at 441 Armour Place NE, Atlanta, Georgia, 30324. ERMI holds legal ownership of, and has

standing to sue for infringement of, United States Patent Number 7,547,289 (hereinafter “the ’289 Patent”) entitled “Shoulder Extension Control Device” which issued on June 16, 2009.

Exhibit 1.

3. ERMI was formerly incorporated in Georgia as ERMI, Inc. but, effective April 1, 2019, ERMI, Inc. was converted to become ERMI LLC. This conversion has been duly recorded with the United States Patent and Trademark Office with reference to the ’289 Patent.

4. On information and belief, RS Medical is a Washington Corporation with principal offices located at 14001 SE First Street, Vancouver, Washington 98684.

5. On information and belief, Defendant has previously and is presently using, selling, offering for sale, leasing, and/or offering for lease, including in this district, products that infringe the ’289 Patent. These products include the product known as the T-Rex Orbit for Shoulder (hereinafter the “Accused Device”). **Exhibit 2.**

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a) and (b) both because it involves a federal question and also because it involves patents.

7. Because the amount in controversy exceeds \$75,000, and because Plaintiff and Defendant are diverse parties, this Court also has original jurisdiction pursuant to 28 U.S.C. § 1332.

8. This Court has *in personam* jurisdiction over RS Medical because RS Medical is incorporated in this state, conducts business in this district, and is engaged in patent infringement in this district.

9. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over all other claims asserted or that may be asserted that are so related to claims within the original jurisdiction of this action that they form part of the same case or controversy under Article III of the United States Constitution.

1 10. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400
2 because RS Medical is an entity that has its principal places of business in this district, and
3 because a substantial part of the events giving rise to ERMI's claims occurred in this district,
4 namely Defendant's using, selling, offering to sell, leasing, offering to lease, and/or distributing
5 products that infringe the '289 Patent.

6 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

7 *The '289 Patent*

8 11. Dr. Thomas P. Branch (hereinafter "Dr. Branch") is a board certified orthopedic
9 surgeon practicing with TREX Orthopedics, P.C., d/b/a University Orthopaedic Clinic in
10 Decatur, Georgia. TREX Orthopedics, P.C., was formed in May 1995. Dr. Branch has
11 continually used the TREX Orthopedics name both internally and on letterhead and business
12 cards since 1996.

13 12. Dr. Branch invented a new and useful Shoulder Extension Control device and
14 method and filed a United States provisional application directed thereto on December 13, 2001.

15 13. One year later, on December 13, 2002, Dr. Branch filed a United States non-
16 provisional application having serial number 10/318,988 (hereinafter the "Application"). The
17 Application claimed priority to the provisional patent application.

18 14. Dr. Branch assigned the Application, and any patents issuing therefrom, to ERMI.
19 The assignment included all rights under the patents including the right to sue for past
20 infringement.

21 15. The Application published to the public on July 10, 2003.

22 16. Prosecution commenced in the United States Patent and Trademark Office
23 ("Patent Office") and the Patent Office issued a first office action on January 13, 2006, in which
24 Claims 1 through 6 of the Application were allowed and declared patentable by the Patent
25 Office.
26

1 17. Prosecution continued as to the remaining claims in the Application. The Patent
2 Office never rejected Claims 1 through 6.

3 18. On March 16, 2009, the Patent Office issued a notice of allowance indicating that
4 Claims 1 through 6 remained allowable and that Claims 31 through 46 were also allowable.

5 19. The Patent Office issued United States Patent 7,547,289, the '289 Patent as shown
6 in **Exhibit 1**, on June 16, 2009 with 22 total claims.

7 20. Exemplary Independent Claim 1 of the '289 Patent is directed to:

8 An apparatus for manipulating the shoulder joint of the left or right arm of a
9 human user, said apparatus comprising:

10 a frame including spaced apart first and second mounting locations;

11 an arm carriage configured to manipulate said shoulder joint of said user, said arm
12 carriage configured to be mounted to one of said first and second mounting locations of
13 said frame;

14 a power unit configured to provide power upon control by said user, said power
15 unit configured to be mounted to the other of said first and second mounting locations of
16 said frame;

17 a linkage intermediate said arm carriage and said power unit, said linkage
18 configured to transfer power from said power unit to said arm carriage;

19 said arm carriage, said power unit, and said linkage configured to allow said arm
20 carriage and said power unit to be switched between said first and second mounting
21 locations and operated in alternating modes, such that in a first operating mode said arm
22 carriage can manipulate the right arm of said user, and such that in a second operating
23 mode said arm carriage can manipulate the left arm of said user.

21. Exemplary Independent Claim 22 of the '289 Patent is directed to:

A method of manipulating the shoulder of a user while seated in a substantially upright position, said user having an upper arm and a forearm, said method comprising the steps of:

A) providing an apparatus itself comprising:

1) a frame;

2) a seat for a user to sit in such that said user can sit in said seat in said substantially upright sitting position while facing a direction substantially along a first axis, said axis being substantially horizontal;

3) an upper arm assembly pivotably mounted relative to said frame about a second axis, said second axis being substantially parallel to said first axis; and

4) a forearm assembly pivotably mounted relative to said upper arm assembly about a third axis and configured to capture the forearm of the user during manipulation of the arm of the user, said third axis being substantially orthogonal to said second axis;

B) securing the forearm of a user to said forearm assembly;

C) selectively discouraging relative movement of said forearm assembly with respect to said upper arm assembly while at the same time allowing said upper arm assembly and said forearm assembly to both pivot together relative to said frame about said second axis;

D) pivoting said upper arm assembly about said second axis relative to said frame while at the same time said relative movement of said forearm assembly with respect to said upper arm assembly is discouraged such that abduction/adduction of the shoulder is created;

1 E) selectively discouraging relative movement of said upper arm assembly with
2 respect to said frame while at the same time allowing relative movement of said forearm
3 assembly relative to said upper arm assembly and said frame about said third axis; and

4 F) pivoting said forearm assembly about said third axis with respect to said upper
5 arm assembly and with respect to said frame while at the same time said relative
6 movement of said upper arm assembly with respect to said frame is discouraged such that
7 external rotation is created at said shoulder.

8 22. The First Maintenance Fee for the '289 Patent was paid on October 1, 2012.

9 23. The Second Maintenance Fee for the '289 Patent was paid on December 1, 2016.

10 24. The '289 Patent is valid and enforceable.

11 ***ERMI's Devices***

12 25. ERMI is a company that manufactures and sells medical devices throughout the
13 United States. The name ERMI is an acronym that stands for "End Range Motion Improvement."

14 26. Many of ERMI's devices are shown and cataloged on ERMI's website,
15 www.getmotion.com.

16 27. ERMI advertises its products on its website, in videos, and in printed media.

17 28. One of these products is the ERMI Shoulder Flexionater® device which is
18 designed to increase motion for those with restricted external rotation, abduction, flexion, and
19 internal rotation. **Exhibit 3**.

20 29. ERMI has made in excess of 1,400 ERMI Shoulder Flexionater® devices.

21 30. The ERMI Shoulder Flexionater® devices are distributed directly by ERMI
22 through a network of sales representatives across the country.

23 31. The ERMI Shoulder Flexionater® devices have been tested and the results of the
24 testing have been published.

25 32. Each ERMI Shoulder Flexionater® device is covered by the claims of the '289
26 Patent and each device is marked with the '289 Patent number. **Exhibit 4**.

33. In addition to showing the images, descriptions, and videos of the ERMI Shoulder Flexionater® device on its website, ERMI exhibits the device at trade shows around the country.

Mr. Eduardo M. Marti Visits ERMI

34. Mr. Eduardo M. Marti (hereinafter “Mr. Marti”) contacted ERMI on November 7, 2013 via email seeking to sell distribution rights to an unrelated product.

35. Mr. Marti met with ERMI on December 13, 2013 and visited Dr. Branch’s office at TREX Orthopedic, P.C., d/b/a University Orthopaedic Clinic.

36. ERMI devices and related literature, including the ERMI Shoulder Flexionater® device and related literature, were on display at the University Orthopaedic Clinic during Mr. Marti’s visit on December 13, 2013. Mr. Marti was exposed to both the TREX name and the ERMI Shoulder Flexionater® device during his visit.

T-Rex Rehab and T-Rex Accused Device

37. Following Mr. Marti’s meeting with ERMI at the TREX Orthopedic, P.C., d/b/a University Orthopaedic Clinic in December 2013, Mr. Marti founded a company named T-Rex Rehab, LLC (hereinafter “Rehab”) in May 2014.

38. Rehab is a Florida limited liability company which has the same address as Mr. Marti, namely 19274 South Hibiscus Street, Weston, Florida 33332.

39. On June 4, 2014, Mr. Marti filed United States provisional patent application 62/007,541 directed to a Powered Knee Exerciser. On August 27, 2014, Mr. Marti filed United States provisional patent application 62/042,399 directed to a 3 Axis Actuator Driven Therapy Shoulder Device. On March 18, 2015, Mr. Marti filed United States provisional patent application 62/134,633 directed to Knee and Shoulder Exercisers. Mr. Marti assigned each of these three provisional applications to Rehab.

40. Based on these provisional patent applications, Mr. Marti also filed several non-provisional patent applications.

1 41. During the prosecution of Mr. Marti's non-provisional patent applications, Mr.
2 Marti filed Information Disclosure Statements which, *inter alia*, included citations to ERMI's
3 website, www.getmotion.com. **Exhibit 5**.

4 42. One of the products made and distributed by Rehab is the Accused Device.
5 **Exhibit 2**.

6 43. On information and belief, Mr. Marti has been and is involved in the advertising
7 activities of Rehab.

8 44. Rehab advertises the Accused Device on its website at [https://trexrehab.com/t-](https://trexrehab.com/trex-orbit-for-shoulder/)
9 [rex-orbit-for-shoulder/](https://trexrehab.com/trex-orbit-for-shoulder/).

10 45. Rehab's website includes citations to the same publications that tested and
11 commented on the ERMI devices.

12 46. Rehab's advertisements, including those on its website, include videos showing
13 the Accused Device being used by a person.

14 47. Rehab's advertisements include a commercial brochure (hereinafter the
15 "brochure") which has been distributed to consumers. **Exhibit 6**.

16 48. In September 2015, a Georgia corporation named T-Rex Investment, Inc.
17 (hereinafter "T-Rex Investment") was formed in Georgia.

18 49. On information and belief, T-Rex Investment was formed as an acquisition
19 company for the purpose of acquiring Rehab.

20 50. On information and belief, on March 9, 2016, T-Rex Investment completed the
21 purchase of at least a portion of Rehab's assets, which included certain patents, patent
22 applications, and distribution channels related to the T-Rex products.

23 51. On information and belief, a Georgia corporation named OneDirect Health
24 Network, Inc. purchased 77% of T-Rex Investment.

25 52. On information and belief, Mr. Marti maintains ownership of at least a portion of
26 Rehab.

RS Medical's Distribution of the Accused Device

53. On information and belief, RS Medical is a distributor of Rehab products including the Accused Device.

54. On information and belief, RS Medical sells, offers for sale, leases, and/or offers for lease Rehab's products, including the Accused Product, in Washington and in this district.

55.

56. RS Medical operates the website <https://www.rsmedical.com>.

57. On information and belief, RS Medical has demonstrated the Accused Device to customers and potential customers.

58. On information and belief, RS Medical has distributed the Accused Device to customers.

59. On information and belief, RS Medical is aware of Rehab's brochure, **Exhibit 6**, or others like it, which, in addition to showing the Accused Device, also shows a photograph of the ERMI Shoulder Flexionater® device, **Exhibit 3**.

60. On information and belief, RS Medical has visited facilities, such as medical facilities, trade shows, or conferences, where the ERMI Shoulder Flexionater® device is used or displayed.

61. On information and belief, RS Medical is familiar with the ERMI Shoulder Flexionater® device and have knowledge of and/or are willfully blind to the claims of the '289 Patent.

COUNT I – WILLFUL DIRECT PATENT INFRINGEMENT

35 U.S.C. §271(a)

62. ERMI hereby incorporates paragraphs 1 - 64 above as if fully set forth herein.

63. Defendant has directly infringed and continues to directly infringe at least Claims 1 and 22 of the '289 Patent through using, selling, distributing, leasing, offering for lease, and/or offering to sell and distribute the Accused Device.

64. The Accused Device embodies at least Claim 1 and Claim 22 of the '289 Patent.

65. Defendant has literally infringed and continues to literally infringe at least one claim of the '289 Patent as shown in the claim chart of **Exhibit 7**, which also includes several pictures of the Accused Device in use. ERMI does not contend that this is the only way the Accused Device infringes the '289 Patent, but this constitutes at least one way that the Accused Device infringes the '289 Patent.

66. Defendant has infringed and continues to infringe at least one claim of the '289 Patent pursuant to the Doctrine of Equivalents.

67. On information and belief, Defendant uses and has used the Accused Device in demonstration of the device.

68. Defendant has willfully infringed and continues to willfully infringe the '289 Patent.

69. As a result of Defendant's unlawful activities, ERMI has suffered and will continue to suffer irreparable harm.

70. Defendant's infringement of the '289 Patent has injured and continues to injure ERMI in an amount to be proven at trial, but not less than a reasonable royalty.

COUNT II – INDIRECT PATENT INFRINGEMENT

35 U.S.C. § 271(b); 35 U.S.C. § 271(c)

71. ERMI hereby incorporates paragraphs 1 - 73 above as if fully set forth herein.

72. On information and belief, Defendant markets, advertises, demonstrates, sell, distributes, leases, offer to lease, and offers to sell and distribute the Accused Device to third parties including doctors, medical practices, care facilities, and directly to end user patients.

73. Defendant has induced and continues to induce infringement of at least Claim 22 of the '289 Patent under 35 U.S.C. § 271(b).

74. In addition to directly infringing the '289 Patent, Defendant indirectly infringes by instructing, directing and/or requiring others, including doctors, medical practices, care

1 facilities, and end user patients, to perform the steps of method Claim 22, either literally or under
2 the Doctrine of Equivalents, of the '289 Patent, where all of the steps of the method claim are
3 performed by either Defendant or its customers, doctors, medical practices, care facilities, end
4 user patients, or some combination thereof.

5 75. The patients directly infringe the '289 Patent by using the Accused Device to treat
6 their shoulders.

7 76. The doctors, care providers, and medical practices also directly infringe the '289
8 Patent by prescribing the Accused Device to patients, by providing instructions on use to
9 patients, and by controlling and directing patients' use of the Accused Device. Defendant has
10 direct knowledge and/or is willfully blind to the fact that they are inducing others, including
11 doctors, medical practices, care facilities, and end user patients, to infringe by practicing, either
12 themselves or in conjunction with Defendant, method Claim 22 of the '289 Patent.

13 77. By advertising, distributing, leasing, and/or selling the Accused Device to others,
14 Defendant has knowingly and intentionally aided, abetted, and induced others to directly infringe
15 at least one claim of the '289 Patent.

16 78. The Accused Device has no substantial non-infringing use.

17 79. By providing the accused products to others, Defendant has contributed and is
18 contributing to the infringement by others of at least Claim 22 of the '289.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff ERMI LLC, by and through the undersigned, hereby
21 respectfully asks the court to enter judgment against Defendant RS Medical and its respective
22 subsidiaries, affiliates, agents, servants, employees, and all persons in active concert or
23 participation with it, granting the following relief:

24 A. An entry of judgment holding that Defendant has infringed and is infringing the
25 '289 Patent and has induced infringement and is inducing infringement of the '289 Patent;
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1 B. An injunction against Defendant and all those acting in concert with it, from
2 using, making, selling, or offering to sell the Accused Device and all colorable imitations
3 thereof;

4 C. An award to ERMI for the full amount of damages sustained, including, but not
5 limited to, any and all damage remedies available pursuant to the patent laws of the United
6 States, 35 U.S.C. §§ 271, *et. seq.*, which include, but are not limited to, lost profits and a
7 reasonable royalty award;

8 D. A determination that Defendant's infringement has been willful, wanton, and
9 deliberate and that the damages against it be increased up to treble on this basis or for any other
10 basis in accordance with the law;

11 E. A finding that this case is exceptional and an award to ERMI of its costs and
12 reasonable attorneys' fees, as provided by 35 U.S.C. § 285;

13 F. An accounting of all infringing sales and revenue together with all pre-judgment
14 and post-judgment interest at the maximum allowable rate on the full compensatory and trebled
15 amount awarded to ERMI, from the first date of infringement of the '289 Patent; and

16 G. Such further and additional relief this Court deems just and proper under the
17 circumstances.

18 **DEMAND FOR JURY TRIAL**

19 Under Rule 38 of the Federal Rules of Civil Procedure, ERMI LLC hereby requests a
20 trial by jury of all issues so triable.

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1 DATED the 1st day of April, 2019.

2 *Respectfully submitted,*

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